

Exhibit 5

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MING YANG, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

Case No.: 12-CV-00054-WAL-GWC

TIBET PHARMACEUTICALS, INC., HONG YU,
TAYLOR Z. GUO, SABRINA Y. REN, WENBO CHEN,
YOUHANG PEN, SOLOMON CHEN, ANDERSON & STRUDWICK,
INC., STERNE AGEE GROUP, INC., HAYDEN ZOU, and
L. MCCARTHY DOWNS, III

Defendants.

ROBIN JOACHIM DARTELL, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

Case No.: 12-CV-00089-WAL-GWC

TIBET PHARMACEUTICALS, INC., HONG YU,
TAYLOR Z. GUO, SABRINA Y. REN, WENBO CHEN,
YOUHANG PEN, SOLOMON CHEN, ANDERSON & STRUDWICK,
INC., STERNE AGEE GROUP, INC., HAYDEN ZOU, and
L. MCCARTHY DOWNS, III, and ACQUAVELLA,
CHIARELLI, SHUSTER, BERKOWER & CO., LLP

Defendants.

DEPOSITION OF LEWIS MCCARTHY DOWNS, III

April 13, 2016

9:31 a.m.

Taken at:

LECLAIR RYAN

919 East Main Street, 24th Floor

Richmond, Virginia 23219

REPORTED BY: Lisa M. Blair, RMR

1 A. Yes, ma'am.

2 Q. Okay. And do you recall again when
3 exactly you discussed -- you first discussed Tibet
4 with Hayden?

5 A. November or December of 2009.

6 MS. FUKS: I'm going to introduce this as
7 Exhibit 3.

8 (Downs Exhibit Number 3 was marked for
9 identification)

10 Q. This is a copy of Plaintiffs'
11 Consolidated Amended Class Action Complaint.

12 Mr. Downs, I trust you've seen this
13 document?

14 A. I've seen this document, yes, ma'am.

15 Q. And can you take a look, if you will, at
16 Paragraph 26, which is on page 7.

17 A. Uh-huh.

18 Q. And it says Taylor Guo --

19 MR. HARTZELL: I'm sorry, which page are you
20 looking at?

21 MS. FUKS: Page 7.

22 Q. And so Taylor Guo has served as Tibet's
23 chief executive officer since 2010.

24 Did you ever meet Taylor Guo?

25 A. I did.

1 Q. Okay. When was the first time you met
2 him?

3 A. The first time I met him was on a trip to
4 China in January of 2011.

5 Q. Okay. And how many times did you meet
6 him?

7 A. Well, that trip lasted a couple of days,
8 and I was -- I don't recall if there was another
9 meeting with him or not, but I don't think so. I
10 think that was the only meeting that I had with
11 Mr. Guo.

12 Q. Had you spoken to him before meeting him?

13 A. No, I had not.

14 Q. And when is the last time you spoke with
15 him?

16 A. I know -- I don't -- I'm sure that I
17 spoke to him sometime in -- I can absolutely state
18 that I spoke to him on January 24th, 2011 during the
19 closing call of the transaction, but I don't recall if
20 I spoke to him after that. I think I did, but I'm not
21 certain.

22 Q. So do you know if you spoke to him after
23 this lawsuit was filed?

24 A. I have not spoken to him after this
25 lawsuit was filed.

1 Q. Have you attempted to contact him since
2 this lawsuit was filed?

3 A. No, I have not attempted to contact him.

4 Q. Do you think he knows what happened to
5 the proceeds from the IPO?

6 MR. HARTZELL: Objection.

7 A. What do you mean, what happened to him?

8 Q. Well, the IPO proceeds were -- which
9 we'll get to later -- they were transferred to a bank
10 account in Hong Kong; is that correct?

11 A. Yes, ma'am.

12 Q. And nobody in this case seems to be sure
13 where they have gone. They may be missing or stolen.
14 Do you think he would be --

15 A. Mr. --

16 MR. HARTZELL: Wait a minute. She doesn't
17 have a question. She's making comments. Wait until
18 she asks the question, listen, and then answer.

19 Q. Given his role in Tibet, do you think he
20 would be in a position to know what happened to the
21 money in the IPO account?

22 A. Given his role at Tibet, he signed the
23 cross receipt acknowledging receipt of the funds into
24 that bank account on behalf of Tibet. What happened
25 after that, I don't know.

1 on the audit --

2 A. Anderson & Strudwick relied on counsel
3 and the experiences that we had had -- that Anderson &
4 Strudwick had had in working on other offerings. They
5 relied on the comfort letter that was provided to us
6 by the auditor. They relied on the opinions of the
7 Hong Kong counsel, the China counsel, and Kaufman and
8 Canoles. They relied on the accuracy and completeness
9 of the prospectus. They relied on the on-site visit
10 that Mr. Nolde and I did early on. They relied on the
11 information that was provided to us by Kaufman and
12 Canoles in the completion of the due diligence. They
13 relied on the due diligence that was specifically
14 requested by NASDAQ before they would approve the
15 listing. They -- I mean, there was a lot of pieces to
16 the puzzle that had to come together for Anderson &
17 Strudwick to make the decision to move ahead and price
18 the deal and market the deal and close the deal.

19 Q. So you said Anderson relied on the
20 accuracy of the prospectus, but everything in the
21 prospectus is representations by management more or
22 less. How could Anderson rely on the accuracy of the
23 prospectus?

24 A. The prospectus was drafted and put
25 together by Kaufman and Canoles with input from

1 management. And Kaufman and Canoles rendered a 10b-5
2 opinion to Anderson & Strudwick stating that the
3 prospectus was accurate and nothing in it was
4 misleading or false.

5 Q. So on --

6 A. And the financial statements were
7 prepared by the auditor.

8 Q. So would Kaufman and and Canoles
9 regularly send you documents about Tibet that they
10 found?

11 A. They provided us -- they provided
12 Anderson & Strudwick with documents relative to their
13 due diligence, and relative to their effort on behalf
14 of Anderson & Strudwick in their capacity as placement
15 agent counsel.

16 Q. Why did Kaufman and Canoles resign as
17 placement agent counsel?

18 A. FINRA -- who was responsible for looking
19 at the transaction in addition to the SEC -- FINRA on
20 behalf of -- doing it to look at compensation of the
21 underwriter, of Anderson & Strudwick, FINRA objected
22 to certain fees that Kaufman and Canoles was making
23 not only for serving as placement agent counsel, but
24 also serving as counsel to the issuer as far as the
25 SEC in British Virgin Island matters. And FINRA said

1 that the compensation that they were -- that it was --
2 it was -- that the fees that they were receiving in
3 those capacities were not in line with their duties as
4 serving as placement agent counsel, in that they were
5 excessive, and that they -- that they said that
6 Kaufman and Canoles could not receive that level of
7 fees if they were serving as placement agent counsel.

8 So Kaufman and Canoles, in November of
9 2010, chose to resign as placement agent counsel, and
10 different placement agent counsel was obtained.

11 Q. And who was the different placement agent
12 counsel?

13 A. Anslow and Jaclin, based in New Jersey.

14 Q. And what happened to all of Kaufman and
15 Canoles's due diligence for the Tibet IPO?

16 A. A lot of it had already been transmitted
17 to Anderson & Strudwick, and it's been included in the
18 materials that have been provided to you. Presumably
19 some of it was retained by Kaufman and Canoles. But
20 in conjunction with their resignation, that's when we
21 insisted that they provide the 10b-5 opinion, which
22 had not been provided in prior IPOs.

23 Q. So they provided a 10b-5 opinion before
24 the offering closed?

25 A. Simultaneously with the closing of the

1 Agritech. I was an observer on Home Owners Choice
2 Insurance Company, which is based in Tampa. I was --
3 way back -- I mean, back like in eFuture's case, I was
4 an actual Board member. But I think for liability
5 reasons somewhere along the way the firm decided that
6 they would rather have its employees serve as
7 observers and not as Board members. So in some cases
8 I was an actual Board member. And I know that there
9 were others, but I just don't recall right now. I
10 tended -- in most cases, the conditions were met,
11 which led to our resignation.

12 Q. And Anderson also decided to designate
13 Hayden Zou as an observer?

14 A. Hayden being the individual that
15 introduced the transaction to Anderson & Strudwick,
16 Anderson & Strudwick felt like that he was in the best
17 position to assist in the duties of being a Board
18 observer.

19 Q. What did you do in your capacity as an
20 observer to Tibet's Board?

21 A. Nothing.

22 Q. And what was envisioned that you would do
23 as an observer?

24 A. It was envisioned -- at the time that I
25 was to become a Board observer, it was envisioned that

1 where it had come public at 5 and-a-half, the fact
2 that Anderson & Strudwick within that period between
3 the closing of the Tibet transaction and April of 2011
4 had decided to not pursue any more China activities
5 because of the fact that the -- that the offerings --
6 that the China offerings were not doing well in
7 general -- not only for the ones that Anderson &
8 Strudwick had done, but the ones other firms were
9 doing as well -- it was felt that it was not a market
10 that the firm wanted to be in, and they didn't want
11 me -- they directed me -- Anderson & Strudwick
12 directed me to not go over there and make that trip --

13 Q. So --

14 A. -- in April.

15 Q. And it said in the prospectus that you
16 had the ability to influence matters that were
17 submitted to Tibet's Board. Did you influence any
18 matters submitted to Tibet's Board?

19 A. I was not permitted by my firm to go back
20 to China to participate in any Board activities; and
21 thus, I was not able to influence the Board.

22 Q. But what about from the closing?

23 A. That was the quiet period then. There
24 was very little -- normally, that 90-day period
25 following the closing of a transaction, very little

1 would have been done by the Board in any event. And I
2 was not -- I had not been notified of a Board meeting
3 during that period of time by the management.

4 Q. Who were you in contact with at
5 management that would have notified you of meetings?

6 A. I was in contact with Hayden Zou, who
7 still had an ongoing interest in Tibet; and I was in
8 contact with Brad Haneberg, who was representing the
9 company as issuer's counsel. And I would have been in
10 contact with Taylor Guo, but not in person, but
11 perhaps by telephone or e-mail.

12 Q. Do you know if Tibet had any Board
13 meetings?

14 A. I do not know.

15 Q. So who decided you should be reimbursed
16 \$12,000 a year annually for your service?

17 A. This was just something that -- I mean,
18 the involvement of an employee of Anderson & Strudwick
19 in matters relating to these other companies did
20 require an involvement of time, and did pull the
21 employee away from other duties at Anderson &
22 Strudwick that he might have been doing otherwise.
23 And under -- and under FINRA rules, we were advised
24 that the compensation that would be payable to an
25 observer had to be no more than that which was paid to

1 the independent directors. And so that's -- and
2 that's what -- that's where it was set.

3 Q. So you would -- it was decided you would
4 be compensated the same as an independent director?

5 A. Yes, ma'am.

6 Q. So were you concerned that your role as
7 an observer could subject you to the same liability as
8 a director?

9 MR. HARTZELL: Objection.

10 A. I was not concerned that the role as an
11 observer, given that I did not sign any registration
12 statements, given that I did not have any official
13 capacity on the Board, given that I was not a voting
14 member of the Board, that I had no say in calling the
15 meetings, that I had no say in attending committee
16 meetings or participating in committee meetings, I was
17 not concerned that my liability was significant, and I
18 did not believe that my liability was that significant
19 as an observer.

20 Q. Were you concerned that your name was in
21 the prospectus as an observer?

22 MR. HARTZELL: What time period?

23 MS. FUKS: From the time the prospectus went
24 out from the time of the IPO.

25 A. At the time that the prospectus went out

1 and the time of the IPO, I think the -- I was not
2 concerned that my name was in the prospectus, because
3 I did not believe my liability to be that significant
4 as an observer, as a non-voting Board observer.

5 Q. So what does it mean that you -- the
6 observers can significantly influence the outcome of
7 matters submitted to the Board?

8 A. It means that they have an opportunity to
9 be heard at the Board meeting.

10 Q. Did you have a veto right?

11 A. Absolutely not. I had no right to vote
12 or approve or deny.

13 MS. FUKS: This is Exhibit 8.

14 (Downs Exhibit Number 8 was marked for
15 identification)

16 Q. And this is an e-mail dated August 18th,
17 2011 from you to Damon Joyner. Subject: Board
18 observer to Tibet Pharmaceuticals.

19 A. Yes, ma'am.

20 Q. So in the second paragraph it says, To
21 date, I have not attended any meetings of the Board of
22 Directors of the company, nor have I received any
23 correspondence from the company relating to Board
24 activities. Also, I have not received any
25 compensation in connection with serving as a Board

1 A. And then I verified them with Taylor.

2 Q. Do you know who had authority to withdraw
3 funds from this HSBC Hong Kong account?

4 A. I do not.

5 Q. Do you know what happened to the money in
6 this HSBC Hong Kong account?

7 A. I do not.

8 Q. Do you know if it was stolen?

9 A. I have no reason to believe that it was
10 stolen.

11 Q. So what do you believe happened to it?

12 MR. HARTZELL: I don't want you to guess or
13 speculate, Mr. Downs. If you know -- if you can
14 answer the question without guessing or speculating,
15 then you should do so.

16 A. What I know is that the company, through
17 its financial statements, reported having the proceeds
18 available to it in the financial statements that came
19 out in March for the quarter ending March 30th of
20 2011, June of 2011, and September 2011. But I don't
21 know -- and I know that they reported it as having the
22 money available, but I don't know what happened to it
23 after that.

24 Q. Did you have any communications with the
25 SEC about the IPO money?

1 in particular that I spoke to at least once or twice
2 was that: Yes, I had visited the company; yes, that I
3 felt that the company was sound and real; and yes,
4 that I didn't believe that the company was a fraud.

5 Q. Do you know if, in fact, an auction of
6 Tibet's assets took place?

7 A. I don't know.

8 Q. Do you believe that it did, sitting here
9 now?

10 MR. HARTZELL: Objection.

11 A. I don't know what happened to the company
12 at this point in time.

13 Q. How was the court judgment against Tibet
14 not detected if appropriate due diligence was done?

15 MR. HARTZELL: Objection.

16 A. I believe that it should have been
17 detected.

18 Q. So whose fault do you think it is that it
19 wasn't detected?

20 MR. HARTZELL: Objection. You're asking the
21 witness for an opinion question. He's here as a fact
22 witness.

23 MS. FUKS: I can ask him for an opinion.

24 Q. Whose job was it to make sure there was
25 no judgment against a company that you were doing an

1 underwriting for?

2 A. I believe that it should have been picked
3 up by one of -- one or all of three different
4 organizations.

5 Q. And those are?

6 A. I believe that Brad Haneberg should have
7 picked it up. I believe that DeHeng law firm should
8 have picked it up. I believe that the auditor should
9 have picked it up.

10 MS. FUKS: This is Exhibit 13.

11 (Downs Exhibit Number 13 was marked for
12 identification)

13 Q. This is an e-mail from you sent Thursday
14 January 20th, 2011 at 9:41 a.m., Bates marked D002310
15 gener@acsbco.com. And it says, subject: Tried to
16 call on Tibet Pharma, no voicemail. Would you please
17 give me a call regarding Tibet Pharmaceuticals?
18 Thanks, Mac.

19 Whose e-mail address is this?

20 A. I don't recall whose e-mail address this
21 is, other than the fact that it was somebody or a
22 general mailbox associated with the auditing firm.

23 Q. And why did you want somebody at the
24 auditing firm to give you a call about Tibet on this
25 day?

1 A. I don't know.

2 Q. Do you know who would know?

3 A. Hong Yu.

4 Q. Do you know if Hayden Zou is in touch
5 with Hong Yu?

6 A. I do not know.

7 Q. Have you ever spoken with Hayden Zou's
8 lawyers?

9 A. No.

10 Q. Do you know if Hayden Zou has control
11 over Tibet's bank accounts?

12 A. I would be very surprised if he did. I
13 do not know.

14 Q. Do you believe that Hayden Zou knows
15 where the IPO funds are?

16 A. No.

17 Q. Would you say that Hayden Zou functioned
18 more as an officer/director of Tibet than just an
19 observer?

20 MR. HARTZELL: Objection.

21 A. I don't believe that Hayden functioned as
22 an officer or a director of Tibet. I believe that
23 Hayden functioned as a consultant to Tibet.

24 Q. Do you know if Hayden Zou has assets to
25 pay for any judgment that's entered in the case?

1 A. I have no knowledge of Hayden Zou's
2 financial situation.

3 Q. So what would you tell investors who are
4 looking for answers as to how this happened?

5 MR. HARTZELL: Objection.

6 A. What would I tell -- would you rephrase
7 the question?

8 Q. What would you tell investors who lost
9 their money in Tibet, and they're looking for answers
10 as to how this happened?

11 MR. HARTZELL: Tell them about what?

12 MS. FUKS: Tell them how a company that was
13 underwritten by Anderson & Strudwick that went public
14 just completely disappeared.

15 MR. HARTZELL: Objection.

16 A. Well, I don't have any -- I don't have
17 any good answers for them. I mean, I know that this
18 was sold as -- by Anderson & Strudwick and by the
19 other participating broker dealers as a very risky,
20 highly risky investment, that clients should not --
21 and it was very clearly stated that clients should not
22 invest more in it than they were prepared to lose,
23 that they -- that there were 30-some pages of risk
24 factors presented in the prospectus, that the ability
25 to obtain a judgment against a Chinese company was